July 24, 2006

MEMORANDUM FOR: DIRECTORS, FIELD OPERATIONS

ACTING DIRECTOR, PRECLEARANCE

FROM: Assistant Commissioner

Office Of Field Operations

SUBJECT: Processing of Aliens in the United States Illegally and

Encountered at a Port of Entry

A recent incident has highlighted a need for a clarification of procedure, authority and responsibility with respect to aliens who are discovered by CBP Officers to be unlawfully present in the United States.

In the instant case, an alien in the United States unlawfully, having previously entered without inspection (EWI), was encountered by CBP Officers after being refused entry to another country.¹ (b)(7)(E)

(b)(7)(E) The subject alien was a likely candidate for removal proceedings. However, the alien was released and removal proceedings were not initiated. As sworn law enforcement officers with both authority and responsibility for the enforcement of the Immigration and Nationality Act (INA), failure to take appropriate action in such cases is unacceptable. Appropriate action may mean including the exercise of discretion, where warranted. Appropriate action, however, may include an exercise of discretion in favor of the alien.

All CBP Officers have the authority to place non-arriving² removable or inadmissible aliens in removal proceedings pursuant to section 240 of the INA. See Department of Homeland Security Delegation Number 7010.3, Customs and Border Protection Delegation Order 1510-03 (March 18, 2005). CBP Officers also have the authority to arrest aliens under section 287(a)(2) of the INA. Section 287(a)(2) of the INA states, in pertinent part:

¹ This memorandum does not address the more specific question — (b) (5) whether an alien who has physically departed the United States but who has been denied entry to a foreign country could be treated as an arriving alien upon his or her return.

² 8 CFR § 1.1(q) states "The term arriving alien means an applicant for admission coming or attempting to come into the United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5) of the Act, except that an alien who was paroled before April 1, 1997, or an alien who was granted advance parole which the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States, shall not be considered an arriving alien for purposes of section 235(b)(1)(A)(i) of the Act."

- (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant
 - (2) . . . to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation [pertaining to laws regulating the admission, exclusion, expulsion, or removal of aliens] and is likely to escape before a warrant can be obtained for his arrest...

Section 287.5(c)(1) of Title 8, Code of Federal Regulations (CFR) states, in pertinent part:

The following immigration officers who have successfully completed basic immigration law enforcement training are hereby authorized and designated to exercise the arrest power conferred by section 287(a)(2) of the Act and in accordance with 8 CFR 287.8(c)(1):

- ...(iv) Immigration inspectors;
- ...(vii) Supervisory and managerial personnel who are responsible for supervising the activities of those officers listed in this paragraph; and
- (viii) Immigration officers who need the authority to arrest aliens under section 287(a)(2) of the Act in order to effectively accomplish their individual missions and who are designated, individually or as a class, by the Commissioner of CBP....

Aliens who are unlawfully in the United States fall under two basic categories: inadmissible and removable. The processes for dealing with each category vary considerably.

Processing of Inadmissible Aliens

In the scenario cited at the beginning of this memorandum, the alien had entered the United States without inspection. As such, he was inadmissible pursuant to section 212(a)(6)(A) of the INA. Grounds of removability under section 237 do not apply in this case because he had not been admitted. In addition to EWIs, some lawful permanent residents (LPR) may also be applicants for admission. Among the options the officers at the port-of-entry could pursue are:

Notice to appear - warrant of arrest and detained

Notice to appear - released own recognizance (OR)

Parole to depart foreign

Withdrawal of application for admission (I-275)

I-160A Refusal (if on the Canadian border)

Some of those options have limited applicability depending on the location and circumstances. All of those options are adverse actions. (b)(7)(E)

(b)(7)(E)

A particularly valuable, and often overlooked, option is "Paroling to depart foreign". Parole is an option only available in the case of an "applicant for admission". See Chapter 16.1(c) of the Inspector's Field Manual. It is important to note that an applicant for admission may or may not be an arriving alien. For example, a non-LPR alien entered the United States without inspection, and is now immigrating to Canada (from the U.S.). The northbound alien stops in the CBP inspection facility for the purpose of exporting a vehicle. He is an applicant for admission to the U.S. (because he was not admitted or paroled), but not an arriving alien. That alien is in the United States unlawfully, and some action needs to be taken.

When an alien has already demonstrated his or her intent to depart the United States, it serves no purpose to issue an NTA. The alien is already executing our ultimate objective, which is to have them removed from the United States. There is no reason to burden the immigration court with these cases. However, it is vitally important that a sworn statement is obtained documenting the unlawful presence,

(b)(7)(E)

Processing of Removable Aliens

For the purpose of this section, a removable alien is any alien who is unlawfully in the United States and, by statute, not considered an applicant for admission. Such aliens would be deemed "removable" pursuant to section 237 of the INA. Aliens that fit into this category could include non-immigrant status violators, non-immigrants who were inadmissible at entry, or LPR's. Possible courses of action for CBP officers at the ports-of-entry include:

Notice to appear - warrant of arrest/detained (i.e., aggravated felon)

Notice to appear - released own recognizance (OR)

LPR's must have a hearing before an Immigration Judge before they can be legally removed from the United States, irrespective of whether they are applicants for admission. Therefore, the options are very limited for LPR's.



Those officers authorized to issue Notices to Appear to non-arriving aliens are listed by title at 8 CFR § 239.1(a) and include Directors, Field Operations and Port Directors. The decision to place a removable alien in removal proceedings will be made at the Port

Director level or higher, taking into consideration all pertinent facts of the case. As with all other adverse actions, reviewing managers must consider whether the use of our discretionary authority is appropriate. Most CBP Officers at ports of entry are not familiar with the (b)(7)(E) processing for a removal case. (b)(7)(E)

(b)(7)(E)

This users manual is available on the CBP intranet site at:

(b)(7)(E)

In addition to the standard documentation in (b)(7)(E) for any removal case, the general narrative should include the reasons cited by for declining to respond.

Expedited Removal most often not an option.

Expedited Removal is generally not an action that can be taken against a non-arriving alien interdicted at a port-of-entry. The topic of this memorandum deals primarily with non-arriving inadmissible or removable aliens. In most cases, Expedited Removal at a port of entry is reserved for arriving aliens. The application of Expedited Removal to non-arriving aliens requires designation by the Commissioner effective upon publication of a notice in the Federal Register. See INA § 235(b)(1)(A)(iii)(II); 8 CFR § 235.3(b)(1)(ii).

One category of aliens so designated are those who arrive in the United States by sea, either by boat or other means, and who have not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility. See Chapter 17.15 of the IFM for further guidance on Expedited Removal of non-arriving aliens. Another category of aliens includes those who are encountered within 100 air miles of the international land border, and who cannot establish continuous physical presence in the U.S. for 14 days. See 69 Fed. Reg. 48877 (August 11, 2004).

Summary

CBP Officers and Supervisors must be cognizant of the full breadth of our authority. Although CBP Officers have typically not exercised their authority under sections 212 or 237 of the INA for placing non-arriving aliens interdicted at a port-of-entry in removal proceedings, this authority does exist, and with it the responsibility to exercise that authority when appropriate.

Questions concerning this policy may be directed to (b)(6)(b)(7)(C) Executive Director, Admissibility Requirements and Migration Control, at (202) (b)(6)(b)(7)(C)

/s/

(b)(6)(b)(7)(C)